Supreme Court, U. S.
FILED
JUN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1753

SLIDELL FORD TRACTOR, INC.,
Petitioner-Relator,

versus

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

GERARD H. SCHREIBER
8137 Oleander Street
P.O. Box 13644
New Orleans, Louisiana 70185
Attorney for Petitioner-Relator

JEANNE M. ROQUES
ROBERT B. CHOPIN
711 Old Spanish Trail
P.O. Box 236
Slidell, Louisiana 70459
504/651-2272
Attorneys for Petitioner-Relator

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT	7
STATEMENT OF CASE	9
ARGUMENT	16
CERTIFICATE OF SERVICE	36
APPENDIX	1a

TABLE OF CASES, STATUTES AND AUTHORITIES

CASES

Brady v. Southern Railroad, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943)	19
Chicago, Rhode Island and Pacific Key Co. v. Howell, 401 F.2d 752 (10th Cir. 1968)	17
Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962)	17
Deniring v. Bolin Oil Co., 422 F.2d 55 (10th Cir. 1970)	17
Emich Motor Corp. v. General Motor Corp., 181 F.2d 70 (7th Cir. 1950); 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951); reh. den. 341 U.S. 906, 71 S.Ct. 610, 95 L.Ed. 1345 (1951)	21
Galloway v. Tenneco Oil Co., 313 So.2d 317 (La. App. 1975)	29

TABLE OF CASES, STATUTES AND AUTHORITIES (Continued)

Page

Hays v. United Fireworks Mfg. Co., 420 F.2d 836 (9th Cir. 1969) 25

Jolley Elevator Corp. v. Schwegmann Bros. Giant Supermarkets, 230 So.2d 640 (La. App. 4th Cir. 1970) writ ref. 255 La. 813, 233 So.2d 251 29

Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394 20

New Mexico Savings & Loan Association v. United States Fidelity and Guaranty Company, 454 F.2d 328 (10th Cir. 1972) 17

Ouachita National Bank v. Williamson, 338 So.2d 172 (1976) 7

Rhynard v. Felori, 315 F.2d 176 33

Southern Television Electronics v. Read, 244 So.2d 624 (La. App. 4th Cir. 1971) writ ref. 258 La. 570, 247 So.2d 392 29

U.S. v. Arnold Schwinn & Co., 87 S.Ct. 1856, 388 U.S. 365, 186 L.Ed.2d 1249 (1967) Rem. 291 F.Supp. 564 24

U.S. v. General Motors Acceptance Corporation, 121 F.2d 376 (7th Cir. 1948) cert. den. 341 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 21

Volasco Products Company v. Lloyd A. Fry Roofing Company, 308 F.2d 383 (6th Cir. 1962) 25

TABLE OF CASES, STATUTES AND AUTHORITIES (Continued)

Page

William Goldman Theatres v. Lowe's, Inc., 69 F.Supp. 103 (Dist. Ct. E.D. Penn. 1946) aff. 164 F.2d 1021 (3rd Cir. 1948) 25,26

STATUTES

Rule 50(a), *Federal Rules of Civil Procedure*, 26 U.S.C. Rule 50 8,16,19

15 *United States Code* 15 3,8,9,21

La. Revised Civil Code, Art. 1957 7,8

La. Revised Civil Code, Art. 1942 8

AUTHORITIES

Lavine and Horning, *Manual of Federal Practice*, p. 585 19

5A *Moore's Federal Practice*, Sec. 50-02 20

CONSTITUTION OF THE UNITED STATES

Amendments V and VII of the United States Constitution 2,3,4,5,6,7,18

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

SLIDELL FORD TRACTOR, INC.,
Petitioner-Relator,

versus

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Slidell Ford Tractor, Inc., petitions the court to issue a writ of certiorari to review the judgment of the United States Court of Appeals, for the Fifth Circuit, in Case No. 77-2379 of the docket of that court, affirming the judgment of a directed verdict for the defendants, Ford Motor Company and Ford Motor Credit Company, in the matter entitled "Slidell Ford Tractor, Inc. vs. Ford Motor Company and Ford Motor

Credit Company", Case No. 75-2691 of the docket of the United States District Court for the Eastern District of Louisiana, Section "G".

A copy of the judgment of the district court and its minute entry or reasons for judgment is printed in the appendix. A copy of the judgment and its reason for judgment of the United States Court of Appeals for the Fifth Circuit, is likewise printed in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated March 16, 1978. No rehearing was applied for by relator.

Further, the judgment of the United States District Court for the Eastern District of Louisiana was dated May 26, 1977. No motion for a new trial was filed. The jurisdiction of this court is invoked under the provision 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1) That the United States District Court for the Eastern District of Louisiana, unconstitutionally and grossly exceeded its discretion in directing a verdict in favor of respondents at the conclusion of relator's evidence, denying relator its constitutional right to due process of law and a trial by jury guaranteed to it by Amendments V and VII of the United States Constitution;

2) That Slidell Ford Tractor, Inc., hereinafter referred to as Slidell, was damaged by the tortious breach of contract that it had with Ford Motor Company, hereinafter referred to as Ford, and Ford Motor Credit Company, hereinafter referred to as Ford Credit, in the amount estimated by Ford and Ford Credit to be $826,822.00, over the life of a Ford Motor Company Tractor Dealership of 15 years, which breach of contract was accomplished by a conspiracy between Ford and Ford Credit in restraint of trade in violation of the Anti-Trust Laws of the United States of America, according to which the amount of damages may be trebled resulting in liability by respondents to relator in the amount of $2,460,000.00, all of which was proven with sufficient certitude and clarity by a preponderance of the evidence which was sufficient for the jury to base a verdict in favor of Slidell;

3) That the court erred in directing a verdict in an anti-trust suit on the grounds that Slidell did not prove damages equal to the jurisdictional amount in United States District Court, when there is no jurisdictional amount requirements under the anti-trust laws of the United States, and this denied relator of due process of law as guaranteed by Amendment V of the United States Constitution; and violated the provisions of 15 U.S.C. 15;

4) Whether the trial judge grossly and abusedly erred in refusing to qualify as an expert in management and decision science, accounting,

quantitative science, and/or economics, a college professor teaching management science and accounting at Loyola University, who had obtained a Bachelor of Business Administration degree with a major in accounting in 1961; a Master's degree in accounting in 1966; and a Doctor of Philosophy degree with a major in management science with minors in accounting and quantitative mechanics in 1975; and who had been a supply officer in the Navy, an accountant in private industry and small business consultant, and a professor of accounting and allied sciences over a period of 15 years; and who testified on direct examination that by an application of management science or a combination of his other areas of expertise, he could take a small corporation with a given sales volume in the first year of its operation and project forward what the anticipated profit of that corporation might be over a given number of years using a certain percentage of profit as a base for the projection; and in doing so denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

5) Whether the trial judge erred in directing a verdict based on his conclusion that the future profits of a business can only be computed on its past profits when the business was not in business long enough to have a history of past profits because of the tortious conspiratorial acts of the appellees, its ability to make a profit having been thwarted by the unlawful activities of the appellees in breach of contract and restraint of

trade, and in doing so, denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

6) Whether the trial judge erred in considering that the effect of the termination of a contract on August 29th, which was two days before its express termination date on September 1st, was not a serious question to be decided by the jury and thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

7) Whether the trial judge erred in failing to observe that a contract that binds a small business to invest a large amount of money in setting up a business to sell a product manufactured by a large manufacturer who represented that the small business would be supplied with enough stock to operate profitably, but which absolved the manufacturer from any obligation to furnish enough of the product to make the business profitable contains no mutuality of obligation and is *contra bonos mores*, and thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

8) Whether the trial judge erred in directing a verdict for appellees concluding the appellant did not prove its damages because the court had refused to allow appellant's expert to testify, when the case was not one where the testimony of an expert was absolutely required for the jury to understand the case and there was ample lay

evidence in the record on which the jury could base a verdict as to the merits and the quantum and thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

9) Whether the trial judge erred in failing to observe that a contract that binds one small party to invest a large amount of money in a business on the representation of a large financing institution that they would furnish the small party with the financing needed for the profitable operation of its business, but which further provided that the large financing institution could terminate the obligation, make the small company put up as much additional money as the large financing institution demanded, change the conditions of the agreement anytime it so desired, and in its sole discretion, contains no mutuality of obligation and is *contra bono mores*, and thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

10) Whether the trial judge erred in directing a verdict in an anti-trust case for the defendant when the evidence proved restricted area for sales and tie-in agreements between conspirators, and thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution;

11) Whether the trial judge erred in excluding evidence as to which party to a contract drew up the contract when Louisiana law provides that

the terms of a contract shall be construed against the person who drew it up. LCC Art. 1957, *Ouachita National Bank v. Williamson*, 338 So. 2d 172. And thus denied relator of due process of law as guaranteed by Amendment V of the United States Constitution.

12) The court erred in refusing to allow a certain letter voluntarily furnished to relator by respondents, which letter expressed an opinion concerning the cancellation of relator's franchise directly opposite that of respondents position at trial into evidence on the grounds it was privileged. Said letter was not privileged, and if it was, such privilege was waived and the refusal to allow its introduction into evidence deprived relator of due process of law as guaranteed by Amendment V to the United States Constitution.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

1) United States Constitution, Amendment V, (no person shall be .... deprived of life, liberty or property, without due process of law ....);

2) United States Constitution, Amendment VII, (In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law);

3) 15 United States Code, 15, (any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee);

4) Rule 50(a) Federal Rules of Civil Procedure, 26 U.S.C. Rule 50(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury;

5) Louisiana Revised Civil Code, Article 1957, (In a doubtful case the agreement is interpreted against him who has contracted the obligation);

6) Louisiana Revised Civil Code, Article 1942, (Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the

following rules . . . . Second, the courts are bound to give legal effects to all such contracts according to the true intent of all the parties.

STATEMENT OF CASE

This is a claim in breach of contract, tort and anti-trust by a small tractor dealership against a giant manufacturer and its wholly owned financing subsidiary.

Ford Motor Company and Ford Motor Credit Company joined together in a conspiracy in restraint of trade to cancel the dealership franchise owned by relator, and in doing so damaged it in its business in violation of the provisions of 15 U.S.C. 15. They breached the contract in effect between themselves and Slidell Ford Tractor, Inc., and committed tortious activities against it.

Slidell, a small Louisiana corporation entered into an agreement with Ford for the establishment of a Ford Motor Company Tractor Dealership in Slidell, Louisiana. Negotiations for the establishment of the dealership began in 1972 between two representatives of Ford, namely, Bobby Lynn and Ed Farley and Emory L. Graves, Sr., President of Slidell. Ford originally solicited Slidell concerning the possibilities of it becoming a franchise dealer.

At the time of the original solicitation and negotiation, Slidell was named Christy-Ann-Lea, Inc., and was in the equipment rental and construction business.

Grandiose promises were made by Lynn and Farley to Graves about the profits to flow by doing business with Ford Motor Company. Lynn met with Graves and filled out for Graves the blank spaces boastfully entitled "Your Invitation To Opportunity". One page delineated the area in which Slidell was permitted to sell, being 25% of St. Tammany Parish, Louisiana; 50% of Hancock County, Mississippi; and 50% of Pearl River County, Mississippi. The territory was specifically outlined on a map furnished to Graves.

The next page entitled "Trading Area Prospectus", was the seduction. It held out glowing promises of a profitable business in its first year of operation based on Total Retail Sales of $277,200; Operator's Salary Plus Net Profits before Taxes $21,800; and Based on Projected Annual Going Rate, Return on Invested Capital, 26.5%.

It did contain a caveat in small print at the bottom page which provided:

> NOTE: All figures are estimated. Obviously, as in the case in all business, sales and profits tend to vary and to rise or fall from year to year due to changing economic, marketing, and other conditions, and depending on the quality and energy of the management of the business.

However, it did not mention the fact that everything depended on Ford supplying Slidell with merchandise to sell which as will be revealed they did not do.

At the time when Slidell took on this dealership there were very few tractors in the whole area. Ford counted them. There were only 41 of all makes, Ford and otherwise.

So that Slidell's sales had to depend on sale of tractors and not on service as there were no tractors to service.

Ford acknowledged this by specifying in a document that Ford typed which repeated all of the same figures, Retail Sales $277,200, Owners Salary Plus Net Profit before Taxes $21,800, all being based on Ford furnishing 21 tractors "First 12 Months Objective".

Graves took the bait and made application for a dealership.

Although the application was made to Ford, section 4 of the application listed four forms to be attached to apply to Ford Credit for a line of credit to finance purchases from Ford, all on Ford Credit forms. although Ford tried to make it appear that there was no compulsion for Slidell to do its wholesale financing with Ford Credit and that this was only a convenience:

1) the forms were picked up by the Ford representative;

2) Graves testified he was compelled to make application to Ford Credit;

3) B. R. Harvill, the Branch Manager for Ford Credit, testified that he knew of no dealers

who did not finance their purchases from Ford through Ford Credit.

Slidell's application for a Ford dealership was approved as was its application to Ford Credit in a document entitled "Tractor And Equipment Finance Plans For Ford Motor Company Dealers".

In good faith Slidell made elaborate arrangements to operate a first-class Ford dealership.

1) Graves built a group of new attractive, well equipped buildings with sales facilities, parts storage facilities, repair facilities, executive office facilities, and demonstration facilities on a site approved by Ford, according to Ford Plans and Specifications and under the supervision of Ford, without profit to himself;

2) Slidell employed salesmen, parts clerks, repairmen, and clerical help and sent them to schools conducted by Ford;

3) Graves invested in Capital Stock in Slidell $10,000.00 and had loaned Slidell by September, 1974, $104,618.00, which method of investing was known to Ford and Ford Credit from financial statements given to Ford each month and never objected to by them;

4) And generally did all of the things required of Slidell in its application to Ford as specified in the application.

Graves, himself, went to several schools at one of which he was instructed that the average life of a Ford Tractor dealership was 15 years and he was given a piece of literature entitled *"Growth Chart"* which projected the sales of a dealership whose first years sales was $250,000.00 to be $815,000.00 at the end of ten years which if started with $277,000.00 sales in the first year and extended for five more years and multiplied by 4.4% as specified in the Dealer Trade Area Prospectus prepared by Ford would have earned for Slidell the amount sued for.

Everything was set for Slidell to do a masterful job. All that it needed to do so was tractors furnished by Ford. In 15 months Ford should have furnished 24. Instead of doing so, between those that Ford did not furnish and those furnished, but taken away and transferred to other dealers, Slidell was left with but eleven tractors to sell. This was admitted by Ford in a list prepared and furnished by Ford and testified to by Graves.

Graves complained about it as did Slidell's assistant manager, Marguerite Rapp, but Ford did nothing.

Graves was of the opinion that Slidell had a line of credit of $70,000.00. On May 30, 1974, Slidell executed a document at the request of Ford Credit that he thought increased the line of credit to $240,000.00.

Finally on July 17, 1974, at about 8:30 A.M., Farley and another Ford representative by the name of Morgan, came to Slidell's premises and unceremoniously walked into Graves' office and an-

nounced to Graves that Ford Credit had cancelled Slidell's line of credit and it was necessary for him to resign. Graves was stunned. He was flabbergasted. He tried to contact Ford Credit to verify the news, but could not contact anyone.

Morgan or Farley told Graves that it made no difference anyway and ordered Graves to sign a letter of resignation, the form for which they furnished, or Ford would take the dealership away anyway.

Graves crestfallen and beaten, yielded to the demand, had Rapp copy the letter of resignation on Slidell stationery and signed it. No meeting of the Board of Directors of Slidell was convened to approve or ratify the act.

Farley and Morgan left and within an hour Farley was back with the Ford Tractor dealer from Hammond with trucks and immediately started stripping Slidell of everything saleable.

Ford inferred that Slidell consented to all transfers, but it is significant to note that not one receipt was introduced by Ford in evidence.

About two weeks later, Slidell received a letter from Ford Credit dated July 16, 1974, which stated that Slidell's wholesale line of credit was *suspended*, not *cancelled* as Morgan stated, and ordered an additional cash investment of $40,000.00 by September 1, 1974. By September, 1974, Slidell had additional cash invested of $41.455.47, which was acknowledged by Ford Credit.

Graves tried to get Slidell's dealership re-established. His overtures to Ford were met with the answer that they were powerless because Ford Credit had cancelled his line of credit. Ford Credit refused to listen because Ford had cancelled the franchise and "he had to have a franchise".

Slidell was boxed in by the conspiracy between Ford and Ford Credit.

It should be noted that on July 17, 1974, Ford had knowledge of a letter allegedly written on July 16, 1974, which was not received by Slidell until several weeks later. A strange coincidence!

Thereafter, back and forth, the conspiracy went on even to the point of Ford Credit taking action to protect Ford and Ford agreeing to pay Ford Credit's legal expenses.

On the trial of the case Slidell offered as an expert witness in management and decision sciences, accounting, quantitative analysis and economics an assistant professor of management sciences and accounting at Loyola University, who had obtained a bachelor's degree in accounting in 1961; a masters degree in accounting in 1966; and a doctorate with a major in management science and minors in accounting and quantitative mechanics in 1975; and who had been a supply officer in the Navy, an accountant in private industry and small business consultant, and a professor of accounting and allied sciences for over 15 years. The trial judge refused to qualify the witness because the court was "unable to accept the doctor as

an expert in management and decision science or quantitative analysis, because I don't understand what they are".

Even though the witness testified that by the application of management science or a combination of his other areas of expertise he would be able to take a small corporation with a given sales volume in its first year of business and project forward anticipated profit over a given number of years using a certain percentage of profit as a base for the projection, the trial judge still refused to qualify the witness even as an accountant.

After the conclusion of Slidell's direct evidence, the court directed a verdict for Ford and Ford Credit.

The United States Court of Appeals for the Fifth Circuit, affirmed the lower court's granting the directed verdict.

ARGUMENT

The district court erred in granting a directed verdict after hearing Slidell's direct evidence. Rule 50(a) of the Federal Rules of Civil Procedure allows a party to move for a directed verdict at the close of the evidence offered by an opponent. This was an abuse of the court's discretion.

In directing its verdict, the trial court said that "on a motion for a directed verdict the court must consider whether there is evidence in the record upon which a jury could properly find a verdict for the party against

whom the directed verdict is requested. The court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable references from the evidence.".

The first part of this statement is a partially correct statement of the law.

In *New Mexico Savings & Loan Association v. United States Fidelity and Guaranty Company*, 454 F.2d 328, (10th Cir. 1972), the court said:

> "Motions for a directed verdict .... may be granted only when the evidence is all one way or so overwhelming in favor of the movant that the trial court in the exercise of its sound discretion would be required to set the contrary verdict aside. Chicago, Rhode Island and Pacific Key Co. v. Howell, 401 F.2d 752, 754 (10th Cir. 1968), Cf. Deniring v. Bolin Oil Co., 422 F.2d 55, 57 (10th Cir. 1970). In applying this rule, the court must view the evidence in the light most favorable to the party opposing the motion, and that party is to be given the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962)"

The error in the trial court's ruling is 1) that the word "any" was not included to modify "evidence" and 2)

the word "properly" was used when it should not have been.

There is no doubt about the fact that the court may direct a verdict, but if it does, the court should proceed with extreme caution. The court must remember that the act of directing a verdict in a jury case is an act of extreme egotism and transgresses on sacred grounds.

Amendment VII to the United States Constitution not only guarantees trial by jury, but further enjoins re-examining facts tried by juries.

There are no caveats imposed that threaten a wrongful verdict. To the contrary, the constitutional right to a trial by jury imports the right that a jury may return a verdict that is wrong as well as return a verdict that is right.

When a judge directs a verdict he is substituting his judgment for that of six peers, whose judgment the litigant is entitled to by constitutional right, on the premise that they are too stupid, ignorant or unlearned to see through the evidence and arrive at the truth.

This is the conclusion that the trial court comes to when the trial court in its ruling considered that the jury had to "properly" find a verdict. "Properly" in whose mind, the jury's or the judge's?

The evidence in this record amply supports an inference that could have been drawn by the jury that Ford and/or Ford Credit breached their contracts with

Slidell and that in so doing they conspired in restraint of trade; and there is also evidence that amply supports an inference as to how much Slidell was damaged.

The jury would have returned a verdict for Slidell which would have busted up Ford and Ford Credit's cartel.

The second part of the court's statement is absolutely correct, except that the court did not follow it. If it had, it would not have directed the verdict. What the court actually did was to analyze Slidell's evidence and then reject it. But that is not the function of the court in a jury case. That is the function of the jury.

To the contrary, if there is any question about the evidence, the motion may not be granted. Lavine and Horning, *Manual of Federal Practice*, p. 585.

The suit sought redress for breach of contract on the part of the defendants, Ford and Ford Motor Credit; as well as for violation of the anti-trust laws of the United States.

A directed verdict under Rule 50 of the Federal Rules of Civil Procedure, 26 U.S.C. Rule 50, should only be granted when the evidence adduced shows there can be only one reasonable conclusion as to the verdict. *Brady v. Southern Railroad*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943). The established rules require the trial court to view the evidence in the light most favorable to the party against whom the motion is

made. *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394 (1965) 5A Moore's Federal Practice Sec. 50.02.

The district court in granting the motion for a directed verdict stated plaintiff had failed to prove its damages. The Court of Appeals in affirming the district court concluded in effect there was no contract in effect between the parties and thus Ford had no obligations toward Slidell Ford Tractor. There is no question, that there was a contract in effect between the parties. Ford Motor Company and Ford Motor Credit Company admitted in its answer to the complaint that there was an agreement in effect between the parties. The agreements were introduced into evidence. All the parties admitted there was a contract in existence.

The testimony shows Slidell Ford Tractor, Inc., was coerced into signing a letter resigning the franchise. If a contract was not in existence there would have been no need for such a letter. The Ford representatives knew, and as their counsel admitted in its answer, there was a contract in existence. The facts further show Ford lacked sufficient cause to cancel it, but decided to do so for some reason known only to them.

The agreement required both parties to perform certain acts. If Ford's position is accepted as correct, that is they were only required to furnish Slidell with an opportunity, they still breached the contract. They failed to provide the opportunity. There was no possible way Slidell Ford Tractor, Inc., could be a successful venture without merchandise to sell. The evidence is abundantly clear the merchandise was not

furnished. The opportunity Ford Motor Company was required and obligated to furnish Slidell Ford Tractor, Inc., was not furnished. Ford violated the contract.

Slidell proved the defendants entered into an illegal conspiracy in violation of the anti-trust laws of the United States, and said conspiracy caused it to suffer in its business. 15, U.S.C. 15, grants an individual the right to prosecute a private anti-trust suit in the courts of the United States, irrespective of the amount in controversy. The court in this matter concluded Slidell failed to show the amount of any damages it suffered. Accordingly, it concluded a direct verdict must be granted.

Graves testified he was forced, prior to becoming a dealer, to do business with Ford Motor Credit. He testified that on the very application he was required to file certain Ford Credit forms. That this was not an application for Ford Credit, but for a Ford dealership, and unless he did business with Ford Credit, he could not obtain the franchise. The courts have held it to be a violation of the anti-trust laws for a automobile manufacturer to force a dealer to use its finance outlet. *U. S. v. General Motors Acceptance Corporation*, 121 F.2d 376 (7th Cir. C.A. 1948); *cert. den.* 341 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497; *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950); 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951); *reh. den.* 341 U.S. 906, 71 S.Ct. 610, 95 L.Ed. 1345 (1951).

Ford Motor Credit's representatives testified that Slidell Ford Tractor, Inc., was a decent client, but they cancelled their contract

> "Because he had to have a franchise before we could establish a line of credit and he had to meet the financial requirements. Number one, he had to have the two together. He had to have substantial credit and he had to have a franchise. He had to have equipment."

It must be remembered that at the time Ford Motor Credit Company cancelled Slidell Ford Tractor, Inc.'s contract, they were not refusing to enter into a contract with Slidell, they were cancelling an existing contract. Slidell was their customer. Slidell was a good client. It paid its bills, and during their contractual history, no major problems arose between the parties. When the contract was cancelled, Slidell had a line of credit and only was attempting to keep it. The only reason Ford Motor Credit Company cancelled the contract was to please a separate and distinct entity, Ford Motor Company.

The evidence was quite clear. Ford Motor Company and Ford Motor Credit Company entered into a conspiracy to put Slidell Ford Tractor, Inc., out of business. Ford Motor Credit Company said they would reinstate relator if Ford Motor Company reinstated the franchise. Ford Motor Company said they would reinstate the franchise if Ford Motor Credit Company reinstated their contract with Slidell. A truly vicious circle.

Ford, after cancelling the contract, also took other actions which revealed the conspiracy they were involved in with Ford Motor Credit Company. Under the

Law of Louisiana, at the time Ford Motor Company delivered merchandise to Slidell Ford Tractor, Inc., Slidell became the record owner of the merchandise. Ford Motor Credit was granted by Slidell a chattel mortgage on the merchandise. This chattel mortgage clearly protected Ford Motor Credit Company in the event Slidell did not make its payments. Ford Motor Company no longer had an interest in the merchandise. Yet within an hour of the cancellation Ford Motor Company began removing everything saleable from Slidell Ford Tractor, Inc. Merchandise it no longer not only did not own, but that which it had no interest whatsoever in. Ford alleges Slidell consented to all transfers, yet it is significant to note that not one receipt was introduced into evidence by Ford. Ford went so far as to agree to pay legal fees incurred by Ford Motor Credit Company in its dealings with Slidell.

Ford Motor Credit for its part was worried about a proposed lawsuit against Ford Motor Company, a separate and distinct entity. They pushed to close the matter out prior to a suit being filed not against them, but Ford Motor Company. If they were not acting in concert with Ford Motor Company, why worry about a proposed lawsuit they would not be a party to?

The interactions between Ford Motor Company and Ford Motor Credit shows they were acting in concert to drive Slidell Ford out of business. The two were one and they go together as a Ford Motor Credit Company representative testified. Such actions had the desired effects, Slidell Ford was driven out of business.

Further there was evidence introduced that Ford limited the area in which a dealer could sell his products. The Dealer Sales Agreement required the dealer to sell the product in volumes satisfactory to Ford. One page 1 of said agreement at paragraph #4 it is stated "while the dealer shall not be limited to the dealer's locality in making sales, only sales by the dealer to customers in such locality will be counted in determing whether the dealer has made sales in volumes satisfactory to Ford". The intent of this provision is quite clear. The dealer shall not sell, but in his own locality. To keep his franchise he must sell in a volume satisfactory to Ford, yet he is not given credit if he sells to a customer who lives out of the area. This is nothing more than an attempt to limit competition. Graves testified he was prohibited from selling outside the assigned territories because the other area had been previously assigned to other dealers. In *U. S. v. Arnold Schwinn & Co.*, 87 S.Ct. 1856, 388 U.S. 365, 186 L.Ed. 2d 1249 (1967) Rem. 291 F.Supp 564, this court held at page 1865:

> "As the District Court held where a manufacturer sells products to his distributors subject to territorial restrictions upon resale, a per se violation of the Sherman Act results . . . . Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons whom an article may be traded after the manufacturer has parted with dominion over it".

These specifics show there was evidence in the record which could have led the jury to conclude the

defendants were acting in violation of the anti-trust laws. Further there was sufficient testimony and evidence to allow the jury to conclude Slidell had been damaged in a set sum. In anti-trust actions a plaintiff is not required to prove its damages with absolute or mathematical certainty or accuracy. *Hays v. United Fireworks Mfg. Co.*, 420 F.2d 836 (9th Cir., 1969). The evidence must only show some approximation of the actual damages so that they may be determined with reasonable certainty. *Volasco Product Company v. Lloyd A. Fry Roofing Company*, 308 F.2d 383 (6th Cir. 1962). Further an award for loss profits is not dependent upon showing a history of profits. In *William Goldman Theatres v. Lowe's, Inc.*, 69 F.Supp. 103 (Dist. Ct. E. D. Penn. 1946) aff. 164 F.2d 1021 (3rd Cir. 1948) the court was dealing with a firm that was never allowed to enter the business. The defendants argued there could never be a recovery for loss of profits in an anti-trust case unless an established business had suffered. The court rejected such a conclusion and allowed damages based on comparative figures of other theatres in the area. The court realized its decision had some speculation and guess work involved in it, but also recognized the Supreme Court rulings that the amount of damages only be proven with approximate accuracy.

In this case the plaintiff has proven its damage with at least approximate accuracy. In the trading area prospectus furnished to plaintiff it was shown he could expect a first year operator's salary plus net profit before taxes to be $21,800.00. Further the same document shows the return in a percentage figure, namely, 26.8%. At page 91 of the record, a growth chart

furnished by the defendant Ford Motor Company, shows what the plaintiff could expect its business to look like over a ten year period.

These are the figures furnished by Ford and which induced Slidell to enter into the agreement. While they are estimates, it is not unreasonable, or merely a speculation to say the jury could not have not concluded they were reasonably accurate. Ford, with all of its experience, with its economist, and marketing personnel furnished these figures. Slidell proved if given the opportunity it would have met or exceeded these figures.

These figures are what Ford calculated a dealership should make. They were based on information available from the performance of other dealers. As in *William Goldman Theatres v. Lowe's, Inc.*, supra, they could have been used by the jury as comparative figures and the basis upon which to render a judgment for relator. These figures were not merely conjectural ones. They were ones this giant corporation with all of its expertise in the tractor business concluded a dealership such as Slidell Ford Tractor, Inc., could reasonably expect to make in profit.

John H. Brandon, a former salesman for the plaintiff, testified the company seriously tried to sell tractors. That they got deposits on some sales, but the product was never furnished by Ford to conclude the sale. That most of the sales were used tractors which Slidell was able to secure on its own.

Rapp, formerly a secretary for Slidell, testified about the need to obtain tractors and the refusal of Ford to furnish them. Further, Slidell sold every used tractor it could find. The testimony of the witnesses show Slidell was able to produce, did sell what it could get hold of, and the only reasons it was not much more successful, was because Ford refused to furnish the tractors.

The total of what Slidell sold is not speculative. The business it was able to do is not purely conjectural. It is a fact, this company was being operated properly. If the product had been made available to it, it would have sold it. The figures contained in the trade area prospectus and the growth chart are not merely speculative. If Ford had produced, as the contract required, Slidell would have made at least the figures detailed in these documents.

The jury very easily could have concluded from the uncontradicted testimony what Slidell would have made on profits over the lifetime of this contract and awarded damages accordingly.

The figures furnished were comparative figures furnished by Ford. The jury could very well have based their verdict on these figures. These figures were not simply pulled out of the air, they were what the parties felt were reasonable and realistic. The record of this company shows there was sufficient evidence in the record to justify a verdict. Any damages awarded would not have been purely speculative or merely guesswork. The evidence would have allowed the jury to assess damages with reasonable accuracy.

The court ruled the plaintiff failed to meet the jurisdictional amount required on its claim for breach of contract. That the amount for damages proved only exceed a little over $6,000.00, and the figures furnished by Ford could not be used to show what Slidell would lose in future profits by the termination of its franchise.

Ford contends the contract in effect between the parties only required Ford to furnish Slidell an opportunity. This is exactly what Slidell contends it was not furnished. That if it had been given the opportunity it would have upheld its end of the contract, and would have been successful. It did uphold its obligations under the contract as much as it could considering Ford's breach of the contract.

The contract, paragraph 4 states the "dealer shall vigorously and aggressively promote and make sales of company products at dealers' locality in volumes satisfactory to Ford". In paragraph 1 of the agreement, Ford agrees to sell company products to the dealer. In order for a dealer such as Slidell to meet its responsibilities it must have products to sell.

The dealer has no opportunity to make a profit unless he has products to sell. The purpose of the contract was supposedly to enter into a mutually and satisfactory arrangement whereby each party would be benefited.

The equipment to be sold by Ford to its dealer is the reason dealers enter into these contracts. Slidell believed it would be furnished tractors; Ford represented

it would. The uncontradicted testimony of the employees of Slidell, Brandon, Rapp and Graves, was Ford did not furnish the tractors. They furnished some and irrespective of the fact they were already sold by Slidell they were transferred to other dealers.

As in anti-trust matters, under Louisiana Law, it is not necessary to prove loss profits with absolute certainty, or even mathematical certainty. It is only necessary there be a sound and reasonable basis for establishing the loss. *Galloway v. Tenneco Oil Co.*, 313 So.2d 317 (La. App. 1975 4th Cir.) writ. den. 318 So.2d 42; *Southern Television Electronics v. Read*, 244 So.2d 624 (La. App. 4th Cir. 1971) writ ref. 258 La. 570, 247 So.2d 392; *Jolley Elevator Corp. v. Schwegmann Bros. Giant Supermarkets*, 230 So.2d 640, (La. App. 4th Cir. 1970) writ ref. 255 La. 813, 233 So.2d 251.

Slidell proved its damages with reasonable certainty. It showed it sold the products it was furnished. As stated ante, it would not have been speculative if the trier of facts in this matter, the jury, had concluded the figures furnished by Ford on the trade prospectus and the growth chart were accurate. Based on the history of Slidell the jury could have concluded if Ford would not have breached the contract, the amount sued for was the amount Slidell lost.

The relator called as an expert witness Dr. John Meredith.

In its Minute Entry of June 15, 1977, the court succinctly stated the qualifications of Dr. Meredith:

"Oral examination of Dr. Meredith revealed that he had a Bachelor of Business Administration Degree from Southern Methodist University, a Master's Degree in accounting from Southern Methodist University and a Ph.D. in management sciences (with minors in accounting and quantitative mechanics) from North Texas State University. Until 1975 Dr. Meredith's major experience both professional and teaching was in the field of accounting, although he has never become a Certified Public Accountant. In 1975 he became a professor of management sciences and accounting at Loyola University. He also testified that he had 'made projections for potential earnings . . . performed certain accounting functions . . . . and set up the accounting systems' for several small businesses in Nacogdoches, Texas area over an unspecified three year period.

When asked to define 'management science' a term with which the court was unfamiliar, Dr. Meredith offered several vague and technical examples of the application of management science techniques. The impression conveyed was that management science is a combination of systems used to optimize business operations. Given a certain business situation, a management scientist could offer advice to improve the efficiency and profitability of the business. This general explanation did not imply that management science could be used to give accurate projections of future

profits of existing businesses, *although when asked directly whether this was an application of management science, Dr. Meredith responded that it was.* (italics added)

But the court refused to qualify Dr. Meredith as an expert because:

> In this case, I find that the witness was unable to adequately define his area of specialization in any form that would meaningfully relate to this case. Dr. Meredith's practical experience was admitted to be limited to three small businesses in Nacogdoches, Texas. He received his Ph.D. in management science only in 1975, and had taught in the field only for one year. He had never been qualified as an expert in any court of law. Dr. Meredith's limited practical and teaching experience hardly qualify him as an expert and his inability to explain his specialty in comprehensible terms presented a further obstacle to qualification.

This was a longer way of saying the same thing that was summarized during the trial when the judge ruled against allowing Dr. Meredith to testify because 1) the judge stated that he did not know what management and decision science, accounting, quantitative analysis and economics were. 2) Dr. Meredith had never been qualified as an expert before.

In other words, because in the judge's opinion, since he did not know or refused to learn what management

science was, which title incidentally explains itself, an expert in management science is not qualified as such; and because an expert has never been qualified before as an expert he is not qualified as an expert.

This is warped logic at its best. Consider its implications for example 1) because a judge never previously judged a case, he is not qualified as a judge 2) because a lawyer never previously tried a case, he is not qualified as a lawyer, 3) because a doctor never previously administered to a patient, he is not qualified as a doctor.

If this is logic, when, if ever, would the judge, the lawyer or the doctor be qualified.

But Dr. Meredith was offered as an expert in additional fields too, namely, accounting and economics. Surely the judge knew what accounting and economics is.

Appellant does not concede that an expert was even necessary in this case. There has crept into the legal practice a fallacious reliance on the role of the expert and an erroneous exaggeration of the expert's importance. The only function of the expert is to help the jury, *if the jury needs help*. In this case, the jury needed no help. All of the evidence in this case pointed toward an unavoidable conclusion that Ford Motor Company and Ford Motor Credit Company induced the plaintiff to go into business with promises of a good business, and then conspired to pull the rug out from under the plaintiff and keep it out.

However, the expert by way of education, training, and experience was qualified to examine relator's business and render an opinion as to what its position would be if the opportunity required of Ford Motor Company was furnished. To help the jury with exact figures in returning a verdict for Slidell Ford Tractor, Inc.

There was clear abuse by the trial judge in failing to qualify Dr. Meredith. *Rhynard v. Felori*, 315 F.2d 176.

Prior to trial, Slidell Ford Tractor, Inc., in response to a motion for production of documents, was furnished a letter by an employee of Ford Motor Company who happened to be an attorney. This letter was initially viewed by counsel for relator in the office of counsel for respondent. Upon request said letter was photocopied by respondents counsel and later mailed to counsel for relator, along with certain other documents.

The morning of trial, respondents moved to have this letter ruled inadmissible and returned. The court granted said motion holding it to be privileged.

However, said letter, while rendering an opinion, did so totally unsolicited. There was no corresponding letter or other request for this individual to render a legal opinion as to the validity of the cancellation by Ford Motor Company of Slidell Ford Tractor, Inc., franchise. The attorney-client privilege does not attach everytime an attorney expresses his position on a matter. The privilege is for the client. It is to allow him to seek advice from his counsel. It is not to allow an at-

torney to render his unsolicited opinion on the validity of a transaction.

Further, the letter was requested and voluntarily furnished. Other requested documents were not furnished because respondents invoked a privilege to them. When they voluntarily chose to furnish this document, they voluntarily relinquished their right to invoke the alleged privilege. Once the respondents chose to relinquish the alleged privilege, it could not be regained at a later date. The document was not covered under the attorney-client privilege, and even if it was, respondents abandoned such a privilege, and the letter should not have been ruled inadmissible.

The record in this matter shows Slidell proved by a proponderance of the evidence that Ford Motor Company and Ford Motor Credit Company violated the anti-trust laws of the United States. That as a result of the conspiracy entered into by them, Slidell was seriously damaged in its business operation. The record shows Slidell proved its damages it suffered. The law does not require it to prove its damages with mathematical certainty, but only with reasonable certainty, which it did. When the evidence is considered in the light most favorable to Slidell, it shows the jury could have been reasonably expected to bring in a verdict for Slidell, It was an error on District Court's part to conclude the evidence could not possibly sustain a verdict for relator. Further it was erroneous for the Court of Appeals to conclude the figures furnished by Ford Motor Company to relator, could not be accepted by the trier of facts, the jury, as reasonably accurate and upon which they could have rendered a judgment.

There is no question but that there was a contract in effect between the parties to this lawsuit, and that relator upheld its obligation under the contract. The evidence shows Ford Motor Company violated the contract by not furnishing Slidell with the product it needed to sell. That there was a reasonable basis in the record upon which the jury could have determined the amounts of profits Slidell lost as a result of the breach by Ford. There was evidence in the record to sustain a verdict and evidence to sustain an award of damages to Slidell. The action of directing a verdict in favor of the respondents was erroneous.

The exclusion of Dr. John Meredith's testimony was an abuse of the court's discretion. He possessed the necessary expertise by way of his formal education; his teaching experience; and his business experience. His testimony would have further proven the damages sustained by relator.

The court erred in directing a verdict, the matter should have been submitted to the jury, and a writ of certiorari should be granted herein.

Respectfully submitted,

GERARD H. SCHREIBER
8137 Oleander Street
P. O. Box 13644
New Orleans, La. 70185
504/482-7861

JEANNE M. ROQUES
ROBERT B. CHOPIN
711 Old Spanish Trail
P. O. Box 236
Slidell, La. 70459
504/641-2272
Attorneys for Relator

CERTIFICATE

I certify that three copies of this petition were served on Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First N.B.C. Building, New Orleans, La., attorneys for respondents, by placing copies of same in the United States Mail, postage prepaid, addressed to them at their respective office of record.

GERARD H. SCHREIBER

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SLIDELL FORD TRACTOR, INC.

versus CIVIL ACTION
NO. 75-2691
SECTION "G"

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY

JUDGMENT

The Court having on May 26, 1977, granted the defendants motion for a directed verdict;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Ford Motor Company and Ford Motor Credit Company and against plaintiff, Slidell Ford Tractor, Inc., dismissing plaintiff's suit at his cost.

Dated at New Orleans, Louisiana, this 26th day of May, 1977.

/s/ NELSON B. JONES
NELSON B. JONES,
CLERK

APPROVED AS TO FORM:
/s/ MOREY L. SEAR
UNITED STATES DISTRICT
JUDGE

[Filed: May 27, 1977]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2379
Summary Calendar*

SLIDELL FORD TRACTOR, INC.,
Plaintiff-Appellant

versus

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Defendants-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana

(March 16, 1978)

Before MORGAN, CLARK*, and TJOFLAT, Circuit Judges.

---

* Rule 18, United States Court of Appeals, Fifth Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Co., 431 F.2d 409 (5th Cir. 1970).

PER CURIAM:

In its suit against Ford Motor Company and Ford Motor Credit Company, Slidell Ford Tractor (Slidell) contended that Ford Motor had breached a dealership agreement with Slidell and that Ford Motor and Ford Credit were engaged in a conspiracy in restraint of trade. At the conclusion of Slidell's direct evidence, the trial judge granted the defendants' motion for a directed verdict. In its appeal from that verdict, Slidell contends that the trial judge committed ten errors. Taken together, those errors amount to a contention that there was evidence upon which a jury could have found for Slidell. For Slidell to prevail it is essential that its evidence establish two points: that Ford Motor and Ford Credit violated contractual provisions or that Ford Motor and Ford Credit engaged in a conspiracy to tie Ford dealerships to obtaining credit from Ford Credit. On both points the trial judge was correct in directing a verdict for Ford Motor and Ford Credit.

Slidell bases its contention that there was a breach of contract on Ford Motor's failure to supply enough tractors for Slidell to make a profit. To prove that it had been damaged by that breach, Slidell relied upon the prospectus that was prepared by Ford Motor prior to the signing of the dealership agreement. The trial judge explained in his minute entry that the primary reason for the directed verdict "was that plaintiff had failed to prove damages with sufficient specificity to carry its burden of proof as to that essential element of its claims." We find no error in that conclusion. The prospectus was no more than a projection of estimated

future earnings for the dealership. The prospectus contained no guarantee that the actual earnings would approximate the projected earnings. In fact, there was an explicit disclaimer of any guarantee clearly printed at the bottom of the prospectus. Moreover, the president of Slidell testified that he knew that Ford Motor was only giving him an opportunity to earn the sums estimated on the prospectus and that the documents which he signed contained no commitment from Ford Motor. The documents themselves support that interpretation.

Slidell's allegation of an antitrust violation is based upon its contention that it was compelled to use Ford Credit as a condition of obtaining the dealership from Ford Tractor. Again, however, that contention was refuted by the testimony of the president of Slidell. He admitted that there was no obligation that Slidell use Ford Credit. His admission was also supported by the documents which he signed.

Thus both the documentary evidence and the testimonial evidence failed to provide a basis for either of Slidell Ford's causes of action. Because "reasonable men could not have arrived at a contrary verdict," the district judge was correct in directing a verdict for Ford Motor and Ford Credit. *See* Boeing Company v. Shipman, 411 F.2 365, 374 (5th Cir. 1969) (en banc).

In addition to our synthesis of Slidell's contentions, we have considered each of the ten grounds of error urged in its brief. Only one of those grounds requires additional discussion. Slidell argues that the trial

judge erred when he refused to qualify Slidell's expert witness. That witness, an associate professor of management sciences and accounting at Loyola University, would have testified to projected earnings that Slidell could have expected had it been furnished the number of tractors estimated in the prospectus. We need not consider whether the professor's field of expertise is sufficiently defined to allow him to testify as an expert, for we agree with the trial judge that even if the professor were an expert his testimony, based as it was upon only the estimated projections in the prospectus, could not have formed the basis for recovery. *See* Autrey v. Williams and Dunlap, 343 F.2d 730, 742 (5th Cir. 1965); Campbell v. Lelong Trust, 327 So. 2d 533, 536 (La. App. 1976). The trial judge has wide discretion in deciding whether to admit a witness as an expert. Salem v. United States Lines Company, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed. 2d 331 (1962). There was no abuse of that discretion in this case.

AFFIRMED.

MINUTE ENTRY
SEAR, J.
JUNE 15, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SLIDELL FORD TRACTOR, INC.
CIVIL ACTION
versus NO. 75-2691
SECTION G
FORD MOTOR COMPANY, ET AL.

This suit for breach of contract, tort, and antitrust law violations came to trial on Monday, May 23, 1977. At the close of the plaintiff's case on Thursday, May 26, 1977 the court granted defendants' joint motion for a directed verdict and assigned oral reasons for doing so. The primary reason was that plaintiff had failed to prove damages with sufficient specificity to carry its burden of proof as to that essential element of its claims.

During the course of the trial plaintiff called Dr. John Meredith to testify regarding the anticipated performance of plaintiff's business over a future period of fifteen years from the demise of the business. Specifically, Dr. Meredith was to project sales, net profit, and owner's salary. Dr. Meredith was tendered as an expert in management and decision science, accounting, quantitative analysis, and economics. After direct examination, traverse examination and numerous questions by myself as to Dr. Meredith's credentials, I declined to qualify Dr. Meredith as an expert. Thereafter plaintiff submitted Dr. Meredith's handwritten statement as an offer of proof of the excluded testimony. Record Doc. No. 46. Pursuant to Rule 103(b) of the Federal Rules of Evidence, the instant statement is now offered as further clarification of "the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon."

Oral examination of Dr. Meredith revealed that he had a Bachelor of Business Administration Degree from Southern Methodist University, a Master's Degree in accounting from Southern Methodist University and a Ph.D. in management sciences (with minors in accounting and quantitative mechanics) from North Texas State University. Until 1975 Dr. Meredith's major experience both professional and teaching was in the field of accounting, although he has never become a Certified Public Accountant. In 1975 he became a professor of management sciences and accounting at Loyola University. He also testified that he had "made projections for potential earnings . . . performed certain accounting functions . . . and set up the accounting systems" for several small businesses in the Nacogdoches, Texas area over an unspecified three year period.

When asked to define "management science", a term with which the court was unfamiliar, Dr. Meredith offered several vague and technical examples of the application of management science techniques. The impression conveyed was that management science is a combination of systems used to optimize business operations. Given a certain business situation, a management scientist could offer advice to improve the efficiency and profitability of the business. This general explanation did not imply that management science could be used to give accurate projections of future profits of existing businesses, although when asked directly whether this was an application of management science, Dr. Meredith responded that it was.

A witness may qualify as an expert by knowledge, skill, experience, training, or education. Rule 702, Fed. R. Evid. The question of whether a witness possesses the requisite qualifications to entitle him to give ex-

pert testimony, is one within the sound discretion of the court. 2 Jones, Evidence § 14:17. A review of the jurisprudence reveals that experts on the question of damages have been qualified or rejected under a wide variety of circumstances. *See, e.g.*, Standard Oil Co. of California v. Moore, 9 Cir. 1957, 251 F.2d 118, 221 cert. denied 78 S.Ct. 1139 (expert qualified on basis of "study, research and general background" although witness lacked occupational experience); Jones v. United States, 10 Cir. 1967, 387 F.2d 1004, 1008, cert. denied 88 S.Ct. 2284 (trial court did not abuse discretion in refusing expert qualification to witness who "testified that his specialty field [was] 'the economy, the finances, the regulation, evaluation and all the elements that go * * * [into the] pricing of utility services', but . . . admitted that he had 'never made an evaluation of an insurance company.' "); Southern Cement Co. v. Sproul, 5 Cir. 1967, 378 F.2d 48, 49 (witness properly qualified as expert when witness had practical experience, although witness had no professional education); Thomas v. American Cystoscope Makers, Inc., E.D. Pa. 1976, 414 F.Supp. 255, 270 (witness properly qualified as expert economist by profession and experience, although he was not actually an actuary); Motorola, Inc. v. Fairchild Camera and Instrument Corp., D. Ariz. 1973, 366 F.Supp. 1173, 1189-90 (witness not accepted as expert when witness testified that he based his opinion only on probabilities, not actual business performance, even though witness had "conducted extensive studies upon the most effective style of management and [had] authored books and articles in this area.")

In this case, I find that the witness was unable to adequately define his area of specialization in any form that would meaningfully relate to this case. Dr. Meredith's practical experience was admitted to be limited to three small businesses in Nacogdoches, Texas. He received his Ph.D. in management science only in 1975, and had taught in the field only for one year. He had never been qualified as an expert in any court of law. Dr. Meredith's limited practical and teaching experience hardly qualify him as an expert and his inability to explain his specialty in comprehensible terms presented a further obstacle to qualification.

Even had Dr. Meredith qualified as an expert, the testimony set forth in his written statement would have been inadmissible. Dr. Meredith would have testified as to future sales, net profit, and owner's salary. Future profits are a proper element of damage for breach of contract or tort under Louisiana law. The sum of future profits is to be determined from past profits. Maddox v. International Paper Co., W.D. La. 1942, 47 F.Supp. 829 (and Louisiana cases cited therein). Damages for projected profits must be proved to a reasonable certainty, and may not be merely conjectural or speculative. Autrey v. Williams and Dunlap, 5 Cir. 1965, 343 F.2d 730; Guidry & Swayne v. Miller, La. 1950, 47 So.2d 721.

Dr. Meredith's statement may be divided into two parts. The first part, consisting of numbered paragraphs one through five, actually projects the future sales, net profit, and owner's salary of the plaintiff. However, the data upon which this estimate is bas-

ed are not derived from the actual business operations of the defendant, but rather derive from plaintiff's exhibits 6 and 9, documents prepared by Ford Motor Company which optimistically project the course of a hypothetical dealership in the Slidell area. These documents are mere estimates based on Ford's experience with other dealerships, and are set forth in the most favorable light in order to persuade the plaintiff to enter into a dealership agreement with Ford. They are not related to plaintiff's actual business performance, and thus are inadmissible to prove future performance.

The second portion of Dr. Meredith's statement, consisting of the remaining paragraphs, discusses the actual business performance of the plaintiff based on plaintiff's business records. (It might be noted that the accuracy of the records was called into question at trial.) However, the only conclusion Dr. Meredith draws from these figures is that they "do show a steadily improving trend for the period in question." He also states that the figures are offered merely "for information". Such evidence falls far short of the requirement of reasonably certain proof of future profits. Dr. Meredith projects no specific, or even approximate, dollar amount from these analyses.

In short, Dr. Meredith's statement would have been excluded as entirely speculative, even had Dr. Meredith crossed the threshold of expert qualification.

/s/ MOREY L. SEAR
MOREY L. SEAR
UNITED STATES DISTRICT
JUDGE

[Filed: June 16, 1977]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2379
Summary Calendar

D. C. Docket No. 75-2691 "G"

SLIDELL FORD TRACTOR, INC.,
Plaintiff-Appellant,

versus

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and tne same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

March 16, 1978

ISSUED AS MANDATE: APR. 7, 1978